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No. 3587

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
For the Ninth Circuit

JAMES E. CARR, *Plaintiff in Error*,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, *Defendant in Error*.

MOTION TO STRIKE TRANSCRIPT OF
RECORD AND TO DISMISS
WRIT OF ERROR.

FILED

FEB 11 1927

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD:

CHAS. W. JOHNSON,

Pasco, Washington,

Attorney for Plaintiff in Error.

EDWARD J. CANNON,

FRANCIS J. McKEVITT,

Spokane, Washington,

Attorneys for Defendant in Error.

NOTICE:

To James E. Carr, Plaintiff in Error herein, and to Chas. W. Johnson, your attorney: You and each of you are hereby notified that the within motion to strike transcript of record and to dismiss writ of error will be filed with the Clerk of United States Circuit Court of Appeals for the Ninth Circuit with instructions to calendar the same for argument on the 23rd day of February, 1921, the day set for argument upon merits of the within entitled cause.

EDWARD J. CANNON,

FRANCIS J. McKEVITT,

Attorneys for Defendant in Error.

COMES NOW the Northern Pacific Railway Company, defendant in error, by its attorneys Edward J. Cannon and Francis J. McKevitt, and moves the Court to strike plaintiff in error's transcript of record and to dismiss the appeal of said plaintiff in error on the following grounds:

I.

Upon the ground and for the reason that plaintiff in error, plaintiff below, has not, nor has his attorney, in any manner complied with Rule 75 of the Rules of the District Court for the Eastern District of Washington, being the Rules for the Ninth Circuit Court of the United States, a copy of which Rule is attached hereto, marked Exhibit "A", and made a part of this motion.

II.

For the reason that a bill of exceptions has not been reduced to writing and settled and signed by the Judge at the time the ruling was made nor at any time subsequent during the trial, nor within such time as the Court or Judge might have allowed same by order made at any time during the trial, nor within the time hereinafter mentioned. Said plaintiff in error, plaintiff below, did not within ten days after the ruling of which he com-

plaintains was made, serve upon the adverse party, defendant in error herein, a draft of any proposed bill of exceptions. No exception pursuant to said rules was made or taken, nor was a concise statement of so much of the evidence or other matter as necessary to explain the exception and its relation to the case made, nor has any other act or thing been done under or pursuant to said Rule 75.

III.

For the reason that Rule 81 of said District Court and of said Ninth Circuit Court has not been in any manner complied with. No notice of motion as to the preparation of a bill of exceptions has been served or filed, nor has the Court or Judge by order made at any time extended the time for making the same, nor has said plaintiff in error, plaintiff below, or his counsel, in any manner complied with Rule 81, of which rule a duly certified copy is hereto attached, marked Exhibit "B", and made a part of this motion.

IV.

For the reason that heretofore and prior to the time of preparing plaintiff's pretended bill of exceptions or applying for a review of said cause, the time had long expired prior to file or make

plaintiff's petition for a writ of review, filed September 1, 1920.

V.

In furtherance of this motion of said defendant in error, said defendant in error attaches hereto and makes a part of this motion the order and memorandum of the Court, Hon. Frank H. Rudkin, presiding, dated the 21st day of September, 1920, a copy of which memorandum is hereto attached and made a part of this motion and marked Exhibit "C" herein.

VI.

Plaintiff in error, plaintiff below, has not in any manner complied with Rule II of this Court in that said plaintiff in error has not at all set out any part or portion, nor the substance of any of the evidence admitted or rejected, of which he claimed error in admitting or in rejecting.

VII.

For the reason that said plaintiff in error has not brought to the attention of the Court any of the evidence relating to the question whether or not the Northern Pacific Beneficial Association was acting as, or was, the agent of the Northern

Pacific Railway Company as set forth in No. 1 of the alleged assignments of error, on page 76 of the Transcript of Record. Said testimony and evidence is now printed and filed herein under order of the Judge of this Court, and is found on page of the additional record printed under such order.

VIII.

For the reason that said plaintiff in error has not brought to the attention of the Court any of the evidence relating to the question whether or not the Northern Pacific Beneficial Association was a charitable institution as set forth in No. 2 of the alleged assignments of error, on page 76, Transcript of Record.

IX.

For the reason that said plaintiff in error has not brought to the attention of the court any of the part of the Northern Pacific Railway or the Northern Pacific Beneficial Association, nor has he made a part of his transcript of record the admissions made in the trial that neither the defendant in error nor the Northern Pacific Beneficial Associa-

tion was in any manner negligent in the employment of the surgeons of the association or said surgeons assistants.

EDWARD J. CANNON,
FRANCIS J. McKEVITT,
Attorneys for Defendant in Error.

EXHIBIT "A".

RULE 75 of the CIRCUIT COURT OF THE
UNITED STATES FOR THE
NINTH CIRCUIT.

Rule 75: BILL OF EXCEPTIONS:

A bill of exceptions to any ruling may be reduced to writing and settled and signed by the Judge at the time the ruling is made, or at any subsequent time during the trial, if the ruling was made during a trial, or within such time as the Court or Judge may allow by order made at the time of the ruling, or if the ruling was during a trial, by order made at any time during the trial, or within the time hereinafter mentioned, and when so signed shall be filed with the Clerk.

If not settled and signed as above provided, a bill of exceptions may be settled and signed as follows:

The party desiring the bill shall within ten days after the ruling was made, or if such ruling was made during a trial, within ten days after the rendition of the verdict, or, if the case was tried without a jury within ten days after written notice of the rendition of the decision, serve upon the adverse party a draft of the proposed bill of exceptions. The exception must be accompanied with a concise statement of so much of the evidence or other matter as is necessary to explain the exception

and its relation to the case, and to show that the ruling tended to prejudice the rights of such party. Within ten days after such service, the adverse party may serve upon the proposing party proposed amendments to the proposed bill. Such proposed bill and the proposed amendments shall within five days thereafter, deliver said proposed bill and amendments to the Judge, who must thereupon designate a time at which he will settle the bill; and the clerk must, as soon as practicable, thereafter notify or inform both parties of the time so designated by the Judge. In settling the bill the Judge must see that it conforms to the truth, and that it is in proper form, notwithstanding that it may have been agreed to by the parties, or that no amendments may have been proposed to it, and must strike out of it all irrelevant, unnecessary, redundant, and scandalous matter. After the bill is settled, it must be engrossed by the party who proposed the bill, and the Judge must thereupon attach his certificate that the bill is a true bill of exceptions; and said bill must thereupon be filed with the clerk.

EXHIBIT "B".

RULE 81 of the CIRCUIT COURT OF THE UNITED STATES FOR THE NINTH CIRCUIT.

Rule 81: EXTENSIONS OF TIME:—

When an act to be done in any action at law or suit in equity which may at any time be pending in this Court, relates to the pleadings in the cause, or the undertakings or bonds to be filed, or the justification of sureties, or the preparation of bills of exceptions, or of amendments thereto, or to the giving of notices of motion, the time allowed by these rules may, unless otherwise specially provided, be extended by the Court or Judge by order made before the expiration of such time; but no such extension or extensions shall exceed thirty days in all, without the consent of the adverse party; nor shall any such extension be granted if time to do the act or take the proceeding has previously been extended for thirty days by stipulation of the adverse party; and any extension by previous stipulation or order shall be deducted from the thirty days provided for by this rule. It shall be the duty of every party, attorney, solicitor, or counsel, or other person applying to the Court or Judge for an extension of time under this rule, to disclose the existence of any and all extensions to do such act or take such proceeding which have previously been obtained from the Court or Judge in contravention of this rule shall be absolutely null and void, and may be disregarded by the adverse party. Nothing herein contained shall interfere with the power of the Court to extend the time to do an act or take a proceeding in any cause until after some event shall have happened or some step in the cause shall have been taken by the adverse party.

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE EAST-
ERN DISTRICT OF WASHING-
TON, NORTHERN DIVISION.

Certificate.

I, W. H. HARE, Clerk of the District Court of the United States for the Eastern District of Washington, Northern Division, hereby certify that the above and foregoing Rules 75 and 81, as set out and marked, respectively, Exhibits "A" and "B", are, and have long been the rules of practice of this Court, adopted and promulgated by the United States Circuit Judges for the Ninth Circuit in the year 1904, and that they have not, nor has either of them, been in any manner abrogated, amended or changed from the day of their adoption and promulgation up to the present time.

(Seal)

WM. H. HARE,

Clerk,

By HARRY J. DUNHAM,

*Deputy Clerk, U. S. District Court, Eastern
District of Washington.*

EXHIBIT "C".

At the time of the allowance of the foregoing "Statement of Facts and Exceptions," the defendant appeared specially and objected to the jurisdiction of the Court to settle or allow a Bill of Exceptions at this time, upon the ground and for the Reason that the rules of this Court in that regard have not been observed or complied with. The rules of Court are, and for years have been, as set forth in the special appearance and these rules have not been followed or complied with in whole or in part. For this reason the jurisdiction of the Court to settle or allow a Bill of Exceptions at this late day is more than questionable; but the plaintiff has gone to the trouble and expense of preparing his record on appeal and earnestly insists that he is entitled to have the same settled and allowed.

I have, therefore, concluded to allow the Bill of Exceptions for what is it worth, submitting the same, and the question of jurisdiction, to the appellate Court for such action as it deems appropriate in the premises.

Dated this 21st day of September, 1920.

FRANK H. RUDKIN,

Judge.